IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 365 of 2006

Judgment reserved on 17.4.2007

Date of decision 23.4.2007

Mohan Lal **…Appellant.**

Versus

State of H.P. **…Respondent.**

Coram

The Hon'ble Mr. Justice : Surjit Singh, Judge.

Whether approved for reporting?[1]

For the appellant : Mr. Vinay Kuthiala, Advocate.

For the respondent : Mr. Ashok Chaudhary, Addl. A.G.

Surjit Singh, Judge

Appellant has been convicted of offences under Sections 376 and 506 of the Indian penal Code for allegedly raping a mentally retarded minor girl and then intimidating her that in case she informed anybody about the offence of rape, she would be done to death. He has been sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs.20,000/- and in default of payment of fine to undergo further rigorous imprisonment for six months for offence under Section 376, I.P.C. and to undergo rigorous imprisonment for one year and to pay fine of Rs.2,000/- and in default of payment of fine to undergo further rigorous

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[1] **Whether reporters of the local papers may be allowed to see the judgment?**

imprisonment for one month for offence under Section 506, I.P.C. Appellant's grievance is that there is absolutely no evidence on record to justify his conviction.

2. Case was registered against the appellant for offences under Section 376 and 506 of the Indian Penal Code on the complaint of a brother of the prosecutrix. His name is Devi Ram (PW-1). The report was lodged on 29.2.2004. It was reported that the prosecutrix, who was aged about 16 years, was of low I. Q. (Mand Budhi) and that she was incapable of taking care of herself to the extent that she was dependent upon others even for taking her bath and wash herself. She was also reported to be not capable of following things and unable to speak. Further, it was reported that five – six days back the mother of the lodger of the report told him that the prosecutrix had been taken to Primary Health Centre for check up and the doctor told that she was carrying four months' pregnancy. He further reported that thereafter he questioned the prosecutrix in local dialect and she told that during the preceding rainy season of school vacation, when she had gone to the forest to graze cattle, one Dinesh Kumar took her to a cave in the rocks and there he had sexual intercourse with her. It was also reported that ten – fifteen days thereafter the appellant also raped her, when she had gone to the cattle-shed situated close to the house of the appellant, to tether cattle and that after that also the appellant had three – four times committed sexual intercourse with her. She also allegedly told him, as per the report, that the appellant threatened her that in case she informed anybody about the rape, he would give her beating.

3. Police got the prosecutrix medically examined. The medicolegal examination was done on 29.2.2004. She was also subjected

to pregnancy test, which revealed that she was carrying pregnancy of twenty-one weeks and six days. According to the report of the pregnancy test, the prosecutrix conceived on or around 27th September. Police conducted further investigation in the matter and filed a report, under Section 173 of the Code of Criminal Procedure, alleging that the appellant had committed offences under Sections 376 and 506 of the Indian Penal Code.

4. Trial Court charged the appellant with both the offences. Appellant pleaded not guilty. Therefore, trial was held. On the conclusion of the trial, the appellant was found guilty and convicted and sentenced as aforesaid. Appellant denied that he had committed sexual intercourse with the prosecutrix.

5. Prosecution examined Devi Ram (PW-1) brother of the prosecutrix, who lodged the FIR, the prosecutrix herself as PW-2, mother of the prosecutrix Nirmala (PW-3) and Adam Ram (PW-5), who once saw the prosecutrix at the house of the appellant taking meals there, to bring the charge home to the appellant.

6. When the prosecutrix entered the witness box, the trial Judge felt that she was suffering from mental disability. He, therefore, put a few questions to her to satisfy himself whether she had mental capacity to make statement on oath. After putting two questions regarding her name and age (the prosecutrix was able to give her name, but not the age), the trial Judge recorded that the prosecutrix had been able to answer the two questions only when the same were put to her in local dialect through one Devidhar son of Laxmi Dutt. Thereafter some more questions were put to the prosecutrix and observation was recorded that the prosecutrix understood

local dialect, but was not able to answer by words of mouth but could answer the same by nodding her head in the affirmative. The trial Judge then recorded that, in view of what he had observed oath was not being administered to the prosecutrix.

7. Statement of prosecutrix was then recorded, without administering oath, in the form of questions answers. For making out what the prosecutrix exactly stated, all the questions put to her and the replies given by her to such questions and the observations made by the trial Court, while recording the questions and answers, as per record of the trial Court, need to be noticed. The same are being reproduced here-in-below without making any changes in it even though it is full of errors and some of the questions, replies and observations make no sense:-

> "The prosecutrix step into the witness box and from her general appearance, she appears to be suffering under some mental disability, hence to determine her capacity to depose as a witness, it is deem essential to put certain questions to her
>
> Q.No.1 What is your name ?
>
> Ans Priya
>
> Q.No.2 What is your age?
>
> Ans I do not know.
>
> The prosecutrix hereafter was able to answer the following questions only after they were put to her in local dilects by local person named Shri Devidhar son of Shri Laxmi Dutt r/o Bihar and who is in court in connection with attending proceeding in the case.
>
> Q.No. 1 Do you understand tree and name of tree?
>
> Ans Yes.
>
> Q.No. 2 Do you know khud?
>
> Ans Yes.
>
> Q.No. 3 Do you go in Yatra?

Ans No.

Q.No. 4 Name the cattle which you possess?

Ans Buffallo, goat, cow

Q.No.5 Did you have meal?

Ans Yes.

Though he did not specify items took in her meal yet she nodded her head in the affirmative to quarry to her that she had maize bread and dal rice. With the proceeding inquiry by this court, to assess the intelligibility of this witness, it appears that she understand local dialect, but is not able to give answer by speech but by nod of the head in affirmative. Hence oath not administered.

Q. No. 1 Did you take cattle to the jungle to graze?

Ans Yes.

Q.No.2 What happened in the jungle and what was the reason for your distend stomach?

Ans. In a very faint voice, the prosecutrix initially named Pinki and then Dinesh.

Q. No. 3 After Dinesh, did anybody else, did burakam with you?

Ans. No.

Q. No. 4 Do you know Mohan?

No.

Q. No. 5 If there is any Mohan in court?

Ans No.

When the entire ongres of person standing in and around the witness box, were made to distance from the prosecutrix and the accused and the accused singularly present in front of the prosecutrix and was asked by the court, whether the person made to singularly stand before her is Mohan?

Ans she nodded her head in affirmative.

Q.No Did he do bra kam with you?

Ans Yes.

Q. No. Did the accused do bura kam in the jungle?

Ans No.

Q. No. Did the accused do bura kam in the house?

Ans Yes and spoke that it occured in the evening.

Q. No. How many time, the accused had did bura kam with you?

Ans. Twice

Cross-examination by Shri P.L. Sharma, Adv.

Q. No.1 Did your mother accompany you at the time you went to tether in the khud?

Ans. No.

Q. No.2 Did the accused ever abuse or slap you when your cattle went to his field on their knot untied?

Ans. No.

Q.No. 3 Did the accused intimidate you?

Ans Yes.

Q. No. 4 Is it correct that, initially Dinesh had sexual intercourse?

Ans Yes.

Q. No. 5 Did thereafter, the accused had did bura with you?

Ans Yes.

And on further quarry to her, that who thereafter had burakam She named Dinesh."

8. From the above reproduced questions, answers and the observations of the Court, it is clear that the prosecutrix initially named only two persons – Pinki and Dinesh – who committed the immoral act. She specifically denied that she knew the appellant or the appellant was present in the Court (per questions No. 4 and 5 in the examination in chief). Thereafter all the persons, standing in and around the witness box, were ordered to move away to some distance and the appellant was required to stand before her and it was only then that on being questioned whether the

man standing before her was Mohan, she nodded in the affirmative. (The proceedings were required to be conducted in camera, but from the observation made by the trial Judge it appears that not only that the proceedings were not held in camera, but several persons were present in and around the witness box itself). It may be pointed out that the learned trial Judge before ordering the examination of the prosecutrix without administering oath, observed that the prosecutrix was not able to answer by words of mouth but only by nod of the head in the affirmative. That means the prosecutrix answers the questions only in the affirmative by nodding her head. In other words, she does not answer the questions in negative by the nod of head. Now, if the prosecutrix answers the questions by nodding the head only in the affirmative, how could she have answered the questions about the involvement of the appellant in the negative, even if she so intended.

9. It was after the appellant was made to stand in front of the prosecutrix and she was asked whether his name was Mohan and whether he had committed immoral act with her that she nodded the head in the affirmative. Then she was asked whether the act was committed in the jungle. The answer was in the negative. The next question put to her was ‘did the accused commit the act in the house’. She answered the question in the affirmative and said that the act was committed in the evening. Next question put to her was how many times the act was committed. Her answer was “twice”. In the cross-examination in reply to a question as to who committed the immoral act after the appellant, she named Dinesh.

10. From an over-all reading of the statement of the prosecutrix, it appears that she is not totally speechless, but speaks a few words, for

example, in reply to a question she said that the immoral act was committed by the accused in the evening and in reply to another question in the cross-examination she named Dinesh as the person, who committed the immoral act after the commission of such act by the appellant. Similarly, in reply to question No. 2 in the examination-in-chief she named Pinki and Dinesh as the persons responsible for her distended belly. Therefore, the observation made by the trial Judge that the prosecutrix is not able to answer the questions 'by speech' but does so only by nodding the head, cannot be said to be absolutely correct.

11. Now, if the prosecutrix is not speechless, as demonstrated hereinabove and can speak a few words, particularly the names, she could have very easily named Mohan appellant also as one of the persons, who were responsible for her distended belly or who had committed the immoral act (Bura Kam), when she was specifically questioned to name the persons, who were so responsible or who committed such act. Not only that she did not name Mohan (the appellant), but she even replied the questions whether she knew anybody by the name of Mohan or was Mohan present in the Court, in the negative. It was on persistent questioning and the appellant having been made to stand in front of her and a leading question having been put to her whether appellant Mohan had also done the immoral act that she nodded her head in the affirmative. Thus, the testimony of the prosecutrix, being prompted, by itself is not sufficient to prove the charge against the appellant.

12. And legally admissible corroborative evidence is lacking. No doubt the brother of the prosecutrix (PW-1) Devi Ram stated that the prosecutrix when questioned after the detection of pregnancy, named

Mohan Lal as one of the two persons, the other being Dinesh Kumar, who had had sexual intercourse with her, but his statement is inadmissible in evidence being hearsay and also does not inspire confidence being at variance with the statement of the prosecutrix made in the Court.

13. PW-1 Devi Ram stated that his mother had observed after the end of the rainy season and on the commencement of the winter season, while bathing the prosecutrix, that she was pregnant and on medical check doctor confirmed that she was carrying four months pregnancy. That means it was some-time in October or November or at the most in December that the mother of the prosecutrix noticed that she was pregnant. The report was lodged with the police on 29.2.2004. The prosecutrix was got medically examined on the same day. Pregnancy test was conducted on 1.3.2004 and it was found that she was carrying pregnancy of 21 weeks and six days or say five months three days. All this suggests that the brother and the mother of the prosecutrix had been knowing at least two months before the lodging of the FIR that the prosecutrix was pregnant. This delay of two months in lodging the report suggests that during this period they had been trying to ascertain by questioning the prosecutrix or by some other means as to who was responsible for the pregnancy of the prosecutrix. Now, if it took two months for the brother and the mother of the prosecutrix to find out from her as to who the culprits were and it is the admitted case of the prosecution that the prosecutrix is not only of low I.Q., but also mentally retarded and it is on record (per statement of the prosecutrix and the observation made by the learned trial Judge in the course of the recording of the statement) that it was on persistent questioning rather prompting by the Public Prosecutor that she named the

appellant as the third person, who committed rape on her and that too when the appellant was made to stand in front of her, a legitimate presumption can be raised that the brother and the mother of the prosecutrix might have been suggesting various names to the prosecutrix and on such suggestion she might have nodded when the appellant's name was suggested. Another reason for such a presumption is that as per contents of the FIR only two persons (the present appellant and one Dinesh) had had sexual intercourse with the prosecutrix and the prosecutrix in her statement as PW-2 named these two persons as Pinki and Dinesh, though later on she named the appellant also as the third rapist on being prompted, as noticed herein-above.

14. Prosecution examined another witness, namely PW-5 Adam Ram, who stated that once in the month of 'Bhadon' of the English calendar year 2003, when he was passing by the house of appellant Mohan Lal, he (the witness) shouted appellant's name upon which the appellant, who was present in the house responded and called him to his house and that when he went there he saw the prosecutrix in one of the rooms taking meals. He stated that the prosecutrix is his real niece. It appears that through the testimony of this witness the prosecution sought to prove that in the month of August the appellant had the opportunity to have sexual intercourse with the prosecutrix. However, the conduct of the appellant in inviting the witness to his house when the prosecutrix was also there is indicative of his innocence. Had the appellant committed sexual intercourse with the prosecutrix, he would not have called the witness to come to his house, when the prosecutrix was present and taking meals there. It may be noticed that the prosecutrix is related to the appellant as the latter is a

brother or cousin of the mother of the prosecutrix and the prosecutrix used to address him as ‘Mama’, per testimony of PW-5.

15. Looking to the aforesaid inconsistencies, discrepancies and the manner in which the prosecutrix named the appellant as one of the persons responsible for impregnating her, it is held that the case of the prosecution does not stand established. Consequently appeal is accepted. Conviction and sentence of the appellant for offences, under Section 376 and 506 of the Indian Penal Code, are set aside and he is acquitted. He being in jail, serving sentence, is ordered to be set at liberty forthwith, provided his detention is not required in any other case.

April 23, 2007 (BC) **(Surjit Singh)**
Judge